

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FRANK MORROW,

Plaintiff,

v.

CITY OF OAKLAND, et al.,

Defendants.

Case No. [14-cv-01514-JD](#)

**ORDER DENYING REQUEST FOR
PRE-FILING ORDER AGAINST
PLAINTIFF**

Re: Dkt. No. 9

Defendant Edwin Wilson has requested that the Court impose a pre-filing order pursuant to 28 U.S.C. § 1651(a) on plaintiff Frank Morrow, Jr., “on the grounds that Morrow’s actions, including the filing of the instant complaint, represent a pattern of abusive, vexatious and harassing litigation behavior intended to needlessly increase the cost of litigation” Dkt. No. 9 at 1. The Court denies the request.

The parties do not dispute that the applicable factors are those addressed and considered by the Ninth Circuit in *DeLong v. Hennessey*, 912 F.2d 1144 (9th Cir. 1990). As a preliminary matter, there, the court “recognize[d] that such pre-filing orders should rarely be filed.” *Id.* at 1147.

At least two of the factors identified in *DeLong* are not met here. First, before imposing a pre-filing order, the district court must create “[a]n adequate record for review [which] should include a listing of all the cases and motions that led the district court to conclude that a vexatious litigant order was needed.” *DeLong*, 912 F.2d at 1147-48. Such a record has not been presented to the Court, and the Court declines any invitation to independently seek to create one. In support of his motion, defendant Wilson points to -- and has attached -- eighteen different “filings and appeals concerning the same defendants, the same factual allegations and the same claims.” Dkt.

1 No. 9 at 3-4. Defendant Wilson asserts that this is plaintiff Morrow's "5th lawsuit." Dkt. No. 22
2 at 3. But this falls substantially short of the bar suggested by the Ninth Circuit court. *See*
3 *DeLong*, 912 F.2d at 1147 (citing three cases where "35 related complaints [were] filed," "over 50
4 frivolous cases [were] filed," and "over 600 complaints [were] filed," respectively) (emphases
5 added). Eighteen assorted pleadings from five allegedly related cases and appeals are insufficient
6 to support a conclusion that a vexatious litigant order is needed.

7 Second, "before a district court issues a pre-filing injunction against a pro se litigant," it
8 must first make substantive findings of "harassment or frivolousness." *DeLong*, 912 F.2d at 1148.
9 Though defendant Wilson repeatedly labels plaintiff as a "serial litigator" and alleges that his
10 filings are "numerous," this is not enough. "An injunction cannot issue merely upon a showing of
11 litigiousness." *Moy v. U.S.*, 906 F.2d 467, 470 (9th Cir. 1990). Defendant Wilson's moving
12 papers do not sufficiently establish that plaintiff's claims are "frivolous" (and even if so, that the
13 "number of complaints was inordinate"), or that plaintiff has engaged in a "pattern of harassment."
14 *DeLong*, 912 F.2d at 1148. On the latter point, the Court is mindful of the Ninth Circuit's specific
15 guidance that district judges need to "be careful not to conclude that particular types of actions
16 filed repetitiously are harassing." *Id.* at 1148 n.3.

17 The Court concludes that issuance of a pre-filing order would not be proper at this juncture
18 and on the basis of the papers defendant Wilson has filed. The request is denied without
19 prejudice.

20 **IT IS SO ORDERED.**

21 Dated: August 13, 2014

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24 JAMES DONATO
25 United States District Judge
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